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IN THE Supreme Court of the United States.

No. 408.

SUMPTER TURNER, SYNDIC OF M. SCHWARTZ & CO., PLAINTIFF IN ERROR,

versus

F. L. RICHARDSON, RECEIVER OF THE AMERICAN NATIONAL BANK, DEFENDANT IN ERROR.

On Writ of Error from Supreme Court, State of Louisiana.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS AND AFFIRM.

FRANK L. RICHARDSON,
FRANK SOULÉ,
of Counsel for Appellee,
for the purposes of these Motions.

NEW ORLEANS, Sept. 29th, 1900.

Palfrey-Dameron Co., L't'd, 304 Camp St., New Orleans, La.

3060

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No. 408.

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versus

F. L. RICHARDSON, Receiver of the American National Bank, Defendant in Error.

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Statement.

The commercial firm of M. Schwartz & Co. of the City of New Orleans, La., was a debtor of the American National Bank of that City on the 5th day of August, 1896, in the sum of Eighty-eight Thousand Six Hundred Twenty and 16-100 Dollars for money loaned. Of this amount the sum of Seventy-four Thousand Forty-five and 16-100 Dollars was secured by pledge of eight hundred shares

of the capital stock of the Schwartz Foundry Company, Limited, of the par value of One Hundred Dollars each, a corporation doing a foundry and machinery business in the City of New Orleans, and other collateral of but little, if any value.

The Bank failed on that day, and F. L. Richardson, defendant in error, was appointed receiver by the Comptroller of the Currency.

M. Schwartz & Co., a few days thereafter made a surrender of their property under the Louisiana State insolvency laws in the State Court, and at a meeting of their creditors called to accept the surrender and elect a syndic, Sumpter Turner and Ed. Weil were elected syndics. Weil having subsequently died, S. Turner, plaintiff in error, now before the Court, became, by agreement of parties, sole syndic of the insolvent estate of M. Schwartz & Co.

The stock of this Foundry Co. was then under the control of the Civil District Court of the parish of Orleans, Division "E," through its Syndic, Sumpter Turner, and was subject to the possession and pledge made to the American National Bank, whose rights were transferred to the Receiver, plaintiff in error.

The Receiver applied to the Civil District Court, Division "E," which had exclusive jurisdiction over the insolvent proceedings of M. Schwartz & Company vs. Their Creditors, to have his claim recognized and his rights as pledgee under a verbal agreement of pledge accompanied by delivery, enforced by a sale of the thing pledged and the proceeds applied to the payment of his claim.

Judgment was rendered in his favor as applied for and on appeal to the Supreme Court of the State it was affirmed (see judgment reported in 52 An., page 1613.) A writ of error was then taken to this Court and granted by one of the Honorable Justices of this Court.

The following Assignment of Errors was made, viz:

"The plaintiff in error, Sumpter Turner, Syndic of the insolvent firm of M. Schwartz & Co., in connection with his petition for a writ of error herein, makes the following assignment of errors which he avers is contained in the final decision, judgment, and decree of the Supreme Court of the State of Louisiana:

FIRST.

"That under Sec. 5234 of the United States Statutes and its provisions, relating to national banks, plaintiff in error, owner of the pledged securities which were declared upon and the sale of which was asked in the suit of F. L. Richardson, Receiver of the American National Bank vs. Sumpter Turner and Edward Weil, Syndics of M. Schwartz & Co., in the State courts of Louisiana, is entitled to the right and privilege of having the application to sell such securities, the sale thereof and the time and manner of the sale, under the direction and authority of the Comptroller of the Currency; that plaintiff in error, in the Supreme Court of Louisiana, by his assignment of errors and as shown by the records in said proceeding, claimed and set up that he was entitled to privilege and right of having the Comptroller of the Currency direct and authorize the application to sell, having the sale ordered, and the manner, terms and time of said sale, and of having the sanction and seal of the approval, judgment and discretion of said Comptroller, under said Sec. 5234 of the United States Statutes and its provisions; and set up and assigned that he had the right and was entitled to the immunity or relief of having the application for the sale of the securities rejected, for the reason that the sale of pledged securities was not authorized under Sec. 5234 of the United States Statutes, such Statute applying only to the sale of property belonging to the Bank, and that the Receiver was incompetent to stand in judgment in said proceeding; and

that the judgment of the Supreme Court of Louisiana was adverse to the right and privilege of plaintiff in error to have the Comptroller of the Currency authorize and direct the sale of said securities, and to give such application to sell, and the sale and the time and the manner thereof, the sanction of his discretion, judgment and authority, under and by virtue of Sec. 5234 of the United States Statutes and its provisions—a right and privilege to which plaintiff was entitled; and that the said Supreme Court of Louisiana held and decreed that the said Receiver could make the application to sell and could sell the securities, under and by virtue of Sec. 5234 of the United States Statutes and its provisions, without the discretion and authority of the Comptroller of the Currency, and further held and decreed that said Receiver was competent to stand in judgment in said proceeding; and that said final judgment of the Supreme Court of Louisiana is an erroneous construction of Sec. 5234 of the United States Statutes, and is violative of said Statute and its provisions."

SECOND.

That under the settled jurisprudence of the Supreme Court of Louisiana, the highest court in said State, the said Court and all the courts of Louisiana will notice their want of jurisdiction *ratione materia* either *ex proprio motu*, or on its being called to the Court's attention, and the Court, when without jurisdiction *ratione materia*, will dismiss and set aside the proceedings or judgment;

"That in his brief for rehearing in said cause, defendant and plaintiff in error argued and urged that jurisdiction over and affecting the liquidation of National Banks, was vested exclusively in the United States Circuit Courts and the Federal Courts, and that the State Courts were without jurisdiction in the said cause, to grant and order the sale authorized under Sec. 5234 of the United States Statutes and its provisions, said defendant and plaintiff in

error, citing paragraphs 3, 10 and 11 of Sec. 629 of the United States Statutes, and the proviso of Sec. 4 of the Act of Congress adopted August 13th, 1888; that said paragraphs and said proviso vested the courts of the United States with exclusive jurisdiction in cases commenced by the United States by direction of any officer thereof, or cases for winding up the affairs of such (National) Banks;

"That the want of jurisdiction *ratione materia* was shown by the pleadings and the record; that defendant and plaintiff in error was entitled to the right, privilege or immunity of having a court of competent jurisdiction pass upon and determine the application to sell, the sale and the manner, terms and time thereof; and that the Supreme Court of Louisiana, in its final decision refusing the rehearing and sustaining its own jurisdiction and that of the State Courts, necessarily and in effect decided adversely to the right of plaintiff in error to have said proceeding and judgment dismissed and set aside for want of jurisdiction *ratione materia* in the State Courts, and to have said matter and controversy determined by the Federal Courts, courts of competent jurisdiction, and was violative of the Act of Congress adopted August 13th, 1888, and the proviso above mentioned.

"That the Supreme Court of the State of Louisiana erred in holding and decreeing in its final judgment:

"1. That the defendant and plaintiff in error was not entitled to the right and privilege, under Sec. 5234 of the United States Statutes and its provisions, to have the direction and authority of the Comptroller of the Currency for the application to sell such securities, the sale and the time, manner and terms thereof;

"2. That defendant and plaintiff in error was not entitled to have the proceedings for the sale instituted and prosecuted by a person competent to stand in judgment,

and that the Receiver was competent to make such application to sell and to prosecute the same and stand in judgment.

"3. In holding that the Supreme Court of Louisiana and the State courts had jurisdiction *ratione materia*, and in denying the exclusive jurisdiction of the United States Courts.

"4. That the Court erred in not setting aside the judgment of the lower State court, and rejecting the demand of the defendant in error, on these grounds;

"That the Supreme Court of Louisiana is the highest court in said State in which a decision of the aforesaid suit and controversy could be had.

"That the error in said final judgment and decree of the Supreme Court of Louisiana, and the proceedings anterior thereto are those specially set out and enumerated above, and they entitle plaintiff in error to a reversal of said final decree and judgment of the Supreme Court of Louisiana, and a rejection by this Court of the demands of the Receiver of the American National Bank.

"Wherefore, plaintiff in error prays that the judgment of said Supreme Court of the State of Louisiana be reversed, and that such directions may be given that full force and efficacy may enure to plaintiff in error by reason of his defenses set up and urged in said cause."

LAW OF THE CASE.

The first part of the assignment of error is that the Receiver was without authority from the Comptroller to bring this suit; that the plaintiff in error "is entitled to the right and privilege of having the application to sell such securities, the sale thereof, and the time and manner of the sale, under the direction and authority of the Comptroller of the Currency."

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This precise question was presented in the case of Bank vs. Kennedy, 17 Wallace 21, where this Court said, Mr. Justice Bradley delivering the opinion: "The first and second errors assigned are that the plaintiff, who is a Receiver, appointed by the Comptroller of the Currency under the fiftieth section of the National Banking Law, is not entitled to bring suit without the authority or direction of the said Comptroller, which is not alleged or shown in this case; and that the action cannot be maintained by the Receiver in his own name as such."

"These objections are based upon the language of the act referred to, as well as the general nature of the Receiver's office. The Statute enacts:"

"That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he shall deem proper, who, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to such association, and upon the order of a court of competent jurisdiction, may sell or compound all bad or doubtful debts and, on a like order, sell all the real and personal property of such association, on such terms as the Court shall direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the twelfth section of this act; and such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller," etc.

"We have already decided in the case of this very receiver that he may bring suit in his own name or use the name of the association. The subject was also lately discussed in the case of the Bank of Bethel vs. The

Pahquioque Bank, and the same views were held, the action being brought against the insolvent bank. This disposes of the question as to the legal right of the receiver to sue."

"It remains, therefore, to determine whether it is necessary for the receiver, before bringing suit in an ordinary case of a debt or claim due the bank, to have the order of the Comptroller for that purpose. In the case already referred to the receiver had instituted a suit in equity against some of the stockholders of the bank for the purpose of charging them with the personal liability prescribed by the twelfth section of the act; and we held that he had no right to do this without the Comptroller's direction. But it will be perceived that that was a very special case, out of the ordinary course, and one which involved an important consideration of the policy to be pursued. Stockholders are not ordinary debtors of the bank, but are rather in the light of creditors, their stock being regarded as a liability. They are entitled to all the surplus that remains, if any should remain, after the payment of the debts. They are only conditionally liable for those debts after all the ordinary resources of the bank have been exhausted, and they ought not to be prosecuted without due regard to the circumstances of the case. The determination on the part of those charged with winding up the affairs of the bank to resort to this ultimate remedy, requires the exercise of due consideration; and a receiver ought not to take it upon himself to decide so important a question without reference to the Comptroller, under whose direction he acts. Although it is his duty to collect the assets of the institution he does not distribute them, and cannot ordinarily know, without reference to the Comptroller, whether a prosecution of the stockholders will be necessary or not. Hence, our decision in the case of Kennedy vs. Gibson cannot fairly be quoted for the govern-

ment of a case like the present, which is a suit to recover an ordinary debt."

"The language of the statute authorizing the appointment of a receiver to act under the direction of the Comptroller means no more than that the receiver shall be subject to the direction of the Comptroller. It does not mean that he shall do no act without special instructions. His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts no special direction is needed, no unusual exercise of judgment is required. They are to be collected, of course; that is what the receiver is appointed to do. We think there was no error in the decision of the court below on these points, and that the action was properly brought by the receiver."

SECOND PART OF FIRST ASSIGNMENT.

While counsel for plaintiff in error assigns for error this want of authority, he at the same time sets up that if this authority had been given the Receiver could not have brought these proceedings for the reason that "the sale of pledged securities was not authorized under Sec. 5234 of the U. S. Statutes, such Statute applying only to the sale of property belonging to the Bank, and the Receiver was incompetent to stand in judgment in such proceeding."

The position is contradictory.

If the Comptroller of the Currency is without authority to authorize the Receiver to bring suit to enforce the collection of a claim secured by pledge under Sec. 5234, U. S. R. S., the plaintiff in error cannot complain that his authority was not given under that section. If he claims that his authority should be given, he is estopped from setting up his want of authority under that section unless he avers and proves that he was led into error by defendant in error, which he has not attempted to do.

In Daniels vs. Tierney, 102 U. S. 415, where one claimed the benefit of a State ordinance, he was subsequently "estopped from setting up that, by reason of anything contained in the ordinance, the bond is invalid."

In Railroad Co. vs. McCarthy, 96 U. S. 258, in delivering the opinion of the Court, Mr. Justice Swayne says: "Where a party gives a reason for his conduct and decision touching anything involved in a controversy he cannot after the litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted to mend his hold."

If, however, this right should be considered, an inspection of the petition upon which the Receiver brought his action will show that this was not simply an application for an order to sell pledged securities, but it was a suit to fix the amount of a disputed claim by judgment to have determined by it that there was a verbal pledge and that these securities, consisting of the Schwartz Foundry Company stock and others, were the securities given in pledge and granting the right to have them sold under the provisions of Art. 3165, Civil Code of Louisiana, reading as follows: "The creditor can not, in case of failure of payment, dispose of the pledge, but when there have been pledges of stock, bonds or other property for the payment of any debt or obligation, it shall be necessary, before such stocks, bonds or other property so pledged shall be sold for the payment of the debts for which such pledge was made, that the holder of such pledge be compelled to obtain a judgment in the ordinary course of law, and the same formalities in all respects shall be observed in the sale of property so pledged as in ordinary cases; but in all pledges of movable property, or rights, or credits, stocks, bonds or other movable property, it shall be lawful for the pledger to authorize the sale or other disposition of the property pledged in such manner as may be agreed upon by

the parties without the intervention of courts of justice, provided that all existing pledges shall remain in force and be subject to the provisions of this act."

"Any clause which should authorize the creditor to appropriate the pledge to himself, or dispose thereof without the aforesaid formalities, shall be null."

SECOND.

This assignment of error is the want of jurisdiction of the State Court "to grant and order the sale, authorized under Sec. 5234 of the U. S. Statutes and its provisions," and that the Federal Courts are vested "with exclusive jurisdiction in cases commenced by the United States by direction of any officer thereof, or cases for winding up the affairs of such National Banks."

When the debtor, M. Schwartz & Co., made a surrender of its property under the State insolvent laws prior to the adoption of the present U. S. Bankrupt Laws, a Syndic was appointed, and the State Court took exclusive control of the rights of the insolvent through its Syndic. Its right of control was complete, subject to the right of pledge held by the Receiver. The Federal Court was as much without jurisdiction over controversies over property under control of the State Court as the State Court would be over property in the possession of a Receiver appointed by a United States Court. In Schroeder vs. Nicholson, 2nd Louisiana 351, the Supreme Court of Louisiana had this question of jurisdiction before it and through Mr. Justice Porter, held: "By the laws of Louisiana, where an insolvent debtor makes a cession of his goods to his creditors and they accept it, there is a transfer of his property; it ceases to be his and becomes theirs. We are unable to distinguish between change of ownership, and any other which may be made under the laws of the State, by the common forms of alienation. And if a judgment, obtained in a court of the United

States, posterior to that transfer, can reach back and avoid it, it must have the same power with regard to every other conveyance. This principle appears to us to strike at the sovereignty of the State, on a matter of the most vital importance to her, and in relation to which we did not suppose her supremacy was doubted. She certainly has a right to regulate property within her limits, and to say how, when and on what conditions it shall cease to belong to one person, and be transferred to another."

In Winchester vs. Heiskell, 119 U. S. 453, it was set up that under 711 R. S., the U. S. Courts had exclusive jurisdiction "of all matters and proceedings in bankruptcy," and an immunity was claimed by the appellants under that Statute from the operation of the decree of the State Court on their rights, because that Statute made the jurisdiction of the courts of the United States exclusive in such cases. "We thus have jurisdiction, but as the decision of the State Court upon this question was clearly right, we do not care to hear further argument. The assignee in bankruptcy appeared in the State Court and litigated his rights there. This he had authority to do, and the judgment in such an action is binding on him. This we have many times decided. Mays vs. Fritton, 20 Wall. 414; Doe vs. Childress, 21 Wall. 642, 647; Scott vs. Kelly, 22 Wall. 57; Eyster vs. Gaff, 91 U. S. 521; Burbank vs. Bigelow, 92 U. S. 179, 182; Jerome vs. McCarter, 94 U. S. 734, 737; McHenry vs. La Societe Francaise, 95 U. S. 58; Davis vs. Friedlander, 104 U. S. 570."

"The question here is not whether that decree thus rendered binds these appellants, but whether the State Court had jurisdiction so as to bind those who were parties to the suit, and those whom the parties in law represented."

"The motion to dismiss is denied, and that to affirm granted."

The claim that a federal question was raised in this cause appears to have been an after thought. No where in the pleadings was there any such question raised or discussed, and the decision of the Supreme Court of the State was rendered against the plaintiff in error on the ground that the testimony showed that the Receiver was entitled to a judgment for the amount claimed with lien and privilege on the property pledged.

Upon an application for a rehearing it was stated for the first time that the decision of this case contained a federal question, that is, the jurisdiction of the State Court over the insolvent proceedings of Schwartz & Co., and it was then claimed for the first time that the Federal Court had exclusive jurisdiction over all questions connected with the liquidation of a National Bank.

In the case of Pim vs. St. Louis, p. 273, 165 U. S., in an action for the recovery of certain real estate in the City of St. Louis, where a claim was made by the plaintiff in error that she was deprived of her property without due process of law, the Court said upon inspecting the record: "We find that no federal right was set up or claimed, in any form, until after the final decision of the case by the Supreme Court of Missouri, and then by a petition for rehearing. That petition was overruled by that Court without any determination of the alleged federal question, indeed without any allusion to it. The claim of the federal right came too late, so far as the revisory power of this Court is concerned." And the writ of error in this suit was dismissed for want of jurisdiction.

An inspection of the decision of the State Supreme Court reported in 52 An., p. 1613, will show that no claim of want of jurisdiction was made or ever passed upon by that Court, and the position of defendant in error is similar to the defendant in the case above cited.

This tribunal has many times ruled to the same effect. We may cite that of the case of Peale vs. Phipps, 14 Howard 368, where in a controversy in regard to the two Statutes of the State of Mississippi, one passed in 1843 and the other in 1846, providing that, "where the charter of a bank shall be declared forfeited, a trustee shall be appointed to take possession of its effects, and commissioners appointed to audit accounts against it, and where these steps have been taken and the commissioners have refused to allow a certain account, the Circuit Court of the United States had no right to entertain a bill filed by the creditors to compel the trustee to pay the rejected account." There was want of jurisdiction.

Again in the case of Walker vs. Flint, 7 Fed. Rep. 435, it was held: "A Federal Court will neither interfere with the property in the lawful custody of the State Court nor tolerate interference by a State Court with property in its custody."

It is clear and beyond controversy that the questions now raised by the plaintiff in error have been many times decided by this Court adversely to him and the writ of error should be dismissed.

The question of jurisdiction has been so clearly and distinctly and so many times decided by this Court, that it may be of interest to examine the grounds on which this assignment of error is founded.

This appears in plaintiff's brief for rehearing only, and he refers to paragraph 3, Sec. 629 of the U. S. Rev. S., providing for jurisdiction in the U. S. Court: "Of all suits at common law where the United States or any officer thereof sueing under authority of any Act of Congress are plaintiffs;" and the only authorities cited in that brief to sustain the petition are the cases of Yardley vs. Dickson, 47 Fed. Rep. 835.

Fisher vs. Yorder, 53 Fed. Rep. 555.

Stevens vs. Burney Dist. Ct., 41st Fed. Rep. 401.

Stevens vs. Burney Dist. Ct., 44th Fed. Rep. 642.

A reference to the first named case will show a decision of two lines, reading: "We have considered the question of jurisdiction in the above cause and are satisfied that the Court has jurisdiction."

The head note of the second reported case reads: "The Federal Courts have jurisdiction over all suits by Receivers of National Banks to collect assets thereof without regard to citizenship of the plaintiff."

The remaining cases are similar to those quoted.

None of these cases apply to the question at issue, viz: whether a Receiver of a National Bank may intervene in an insolvency proceeding in a State Court, in which is vested the right of ownership in the property pledged and obtain a judgment recognizing his rights under his pledge, and authorizing him to take the necessary steps to realize upon the property pledged by the insolvents.

Because this right of ownership was vested in the Syndic, the officer of the State Court, it became necessary for the Receiver to enter that Court in order to have his rights as pledgee determined. No other court could determine these rights, and although plaintiff in error terms these proceedings as simply an application for an order to sell, he falls into a grave error in doing so. The Supreme Court of the State in its opinion rendered by Mr. Justice Blanchard, in this cause, at 52 An. p. 1618, Pamphlet No. 8, says:

"The Receiver was entitled to take action at any time, the claim of his principal being due to realize on the pledged stocks and bonds. He could not be expected to make parties to his suit, to obtain the order to sell, all the creditors of M. Schwartz & Co. He was not obliged to litigate with them his right to obtain such order. His suit is not even one to establish a pledge

claimed. He tells the Court the insolvent firm of M. Schwartz & Co. owes him, in his official capacity, an indebtedness, and to secure it he has in pledge certain stocks and bonds which he wants to sell in order to realize payment of the indebtedness. He asks an order to sell. As incidental to his right to obtain this order he must establish the indebtedness he claims, and he does so. Were Schwartz & Co. not commercially dead, were they still a going concern and not in the insolvent court, the Receiver would proceed against them as parties defendant in this suit to obtain the order to sell. But since they are insolvent and their affairs in the hands of Syndics appointed to administer the same, it is obvious that the legal representative of the insolvent estate, the Syndics, are properly made parties defendant in this action to obtain the order to sell the property pledged. They have an interest to represent—the eventual right to the residuum. As we have seen, they could, themselves, sue to enforce the ascertainment and realization of this residuum. They could be parties plaintiff, yet we are told they may not be parties defendant. This is met by the express terms of the law which authorizes a syndic to sue and be sued in everything which respects the rights and actions pertaining to the insolvent debtor." R. S. 1811.

We therefore respectfully submit that we have shown that there was no error in the judgment of the State court in holding:

1st. That the Receiver of the American National Bank did not require the authority of the Comptroller of the Currency in order to bring suit to fix the amount due; to have his pledge recognized; and to cause to be sold under the pledge the securities in his possession.

2d. That the Receiver was authorized under Sec. 5234 of the U. S. Statutes to bring these proceedings, and

the matter has been determined heretofore by this Court by the authorities above cited.

3d. That the Civil District Court of the State of Louisiana, in which the insolvency proceedings against M. Schwartz & Co. were pending and which had possession of all the assets of the insolvent, subject to the pledge of the property in the possession of the Receiver, defendant in error, had jurisdiction to hear and decide the application brought by the Receiver.

We submit this question has been heretofore determined by this Court as appears by the authorities above cited, and it is obvious that the writ of error herein taken was for delay, and this writ should be dismissed or the decree of the State Court affirmed.

Respectfully submitted,

FRANK L. RICHARDSON,

FRANK SOULÉ,

of Counsel for Appellee,
for the purposes of these Motions.

NEW ORLEANS, Sept. 29th, 1900.